

# DORSEY, WINDHORST, HANNAFORD, WHITNEY & HALLADAY

2200 FIRST BANK PLACE EAST  
MINNEAPOLIS, MINNESOTA 55402

(612) 340-2600

CABLE: DOROW

TELEX: 29-0605

TELECOPIER: (612) 340-2868

880 W-FIRST NATIONAL BANK BUILDING  
ST. PAUL, MINNESOTA 55101  
(612) 227-8017

P.O. BOX 848  
340 FIRST NATIONAL BANK BUILDING  
ROCHESTER, MINNESOTA 55903  
(507) 288-3158

201 DAVISON BUILDING  
8 THIRD STREET NORTH  
GREAT FALLS, MONTANA 59401  
(406) 727-3632

1150 RING BUILDING  
1200 18TH STREET N.W.  
WASHINGTON, D.C. 20036  
(202) 296-2780  
(800) 424-2942

312 FIRST NATIONAL BANK BUILDING  
WAYZATA, MINNESOTA 55391  
(612) 475-0373

30 RUE LA BOETIE  
75008 PARIS, FRANCE  
TEL: (1) 562 32 50

DENNIS P BURATTI  
ROBERT L HOBBS  
BARRY D GLAZER  
IRVING WEISER  
STEPHEN E GOTTSCHALK  
KENNETH L CUTLER  
OWEN C MARK  
GARY M JOHNSON  
ROBERT G BAYER  
STUART R HEMPHILL  
J JACKSON  
W CHARLES LANTZ  
J MARQUIS EASTWOOD  
EDWARD J PLUMMER  
J ROBERT HIBBS  
BRUCE W BURTON  
SUZANNE B VAN DYK  
STEVEN F WOLDAMOT  
JAMES E BOWLUS  
THOMAS D VANDER MOLEN  
MARK A JARBOE  
PAUL B KLAAAS  
MARGERY K OTTO  
RONALD J BROWN  
CATHERINE A BARTLETT  
DAVID J LUBBEN  
BRUCE J SHNIDER  
GEORGE G ECK  
BARBARA B FARRELL  
MARIAANNE D SHORT  
MICHAEL E REESLUND  
ELIZABETH GOODMAN  
MARIAANNE E DURKIN  
ROBERT J DWYER JR  
BRIAN E PALMER  
JEROME P GILIGAN  
DIANE O MALFELD  
WILLIAM J BEHENS  
JAMES D ALT  
JOEL W LAVINTMAN  
JEFFREY W SOGARD

MARILYN J JUSTMAN  
TIMOTHY J CARLIN  
BARBARA J MCADDO  
JOSEPH R LIESCH  
JOHN H UNOSTROM  
CRAIG D DIVINEY  
THOMAS E POPOVICH  
SUSAN J THOMPSON  
PHILIP M CHEN  
JOHN T KRAMER  
PAUL M TORGERSON  
JOYCE M CONNELLY  
TIMOTHY J WALSH  
JOSEPH C GONNELLA  
MARK E HAMEL  
STEPHEN P KELLEY  
PAMELA A FERGEN  
CHERYLL GRASMOEN  
JAY L SWANSON  
GARY L BRISBIN  
RANDALL B OHM  
JAMES R DORAN  
REGINA C WILLIAMS-ROTAR  
JAMES B LYNCH  
KEVIN W ROUSE  
DANIEL P O'KEEFE  
CHARLES L SWEERIS  
MICHAEL J WANDOSKE  
DONALD M AMUNDSON  
ROY A GINSBURG  
  
OF COUNSEL  
WALDO F MARQUART  
JOHN F FINN  
LEWIS L ANDERSON  
RUDOLPHE LOW  
  
\*ADMITTED IN MONTANA

March 29, 1982

The Honorable Paul A. Magnuson  
Judge of the United States District Court  
754 United States Courthouse  
316 North Robert Street  
St. Paul, Minnesota 55101

Re: U.S. v. Reilly Tar & Chemical Corp.  
File No. Civ. 4-80-469

Dear Judge Magnuson:

This is a reply to Mr. Shakman's letter of March 19.

We submit that the EPA's action in publishing for comment a proposed revised National Contingency Plan ("NCP") has neither improved nor diminished the arguments of any party with respect to Reilly's motion to dismiss. Obviously, the purpose of publishing any proposed rule is to solicit public comments with respect to possible further modifications in the rule. After receiving such comments, we understand that the EPA is to publish a proposed "final" NCP within 90 days from February 12. See EDF v. Gorsuch (D.D.C. 2-12-82). However, the EPA intends to seek a further extension of that timetable. See 47 Fed. Reg. 10978-10979 (March 12, 1982). Moreover, even after adoption by the EPA, the NCP is subject to further review by the Office of Management and Budget. See Executive Order No. 12316, August 14, 1981, Section 1(f). Thereafter, the NCP is to be transmitted to the United States Senate and the House of Representatives. It does not become effective if within 90 days, it is "vetoed" by Congress. CERCLA § 305, 42 USCA § 9655. Thus, we suggest that no one knows what the final NCP will really look like.

This uncertainty reaffirms the point that we made on oral argument. If this case were tried today, we would not be able to ascertain whether the response costs at issue are consistent with the NCP. Even the draft NCP as published contains provisions which, in our judgment, are not consistent with the remedial

US EPA RECORDS CENTER REGION 5



515904

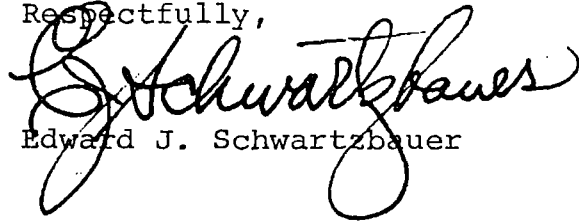
The Honorable Paul A. Magnuson  
Page Two

March 29, 1982

measures specified in the prayer for relief in this case and in the letter from the United States Attorney dated February 25, 1981. However, the mere mention of those inconsistencies makes it apparent that it is premature to recite them.

Since the sufficiency of a complaint must be tested at the time it is filed, the action should be dismissed.

Respectfully,

A handwritten signature in cursive script, reading "E. Schwartzbauer". The signature is written in dark ink and is positioned above the printed name.

Edward J. Schwartzbauer

EJS:ml

cc: All Counsel of Record

# DORSEY, WINDHORST, HANNAFORD, WHITNEY & HALLADAY

2200 FIRST BANK PLACE EAST  
MINNEAPOLIS, MINNESOTA 55402

(612) 340-2600

CABLE: DOROW

TELEX: 29-0605

TELECOPIER: (612) 340-2888

HENRY HALLADAY  
ARTHUR B. WHITNEY  
RUSSELL W. LINDQUIST  
DAVID R. BRINK  
HORACE HITCH  
ROBERT J. JOHNSON  
MAYNARD B. MASSELOQUIST  
PETER DORSEY  
GEORGE P. FLANNERY  
CURTIS L. ROY  
ARTHUR E. WEISBERG  
DUANE E. JOSEPH  
JAMES B. VESSEY  
WILLIAM A. WHITLOCK  
EDWARD J. SCHWARTZBAUER  
THOMAS M. BROWN  
CORNELIUS D. MAHONEY, JR.  
WILLIAM C. BARCOCK  
THOMAS S. ERICKSON  
MICHAEL E. BRESS  
RAYMOND A. REISTER  
JOHN J. TAYLOR  
WILLIAM J. HEMPEL  
JOHN S. HIBBS  
ROBERT O. FLOTTEN  
JOHN D. LEVINE  
ROBERT J. STRUYK  
MICHAEL A. OLSON  
LARRY W. JOHNSON  
THOMAS S. HAY  
G. LARRY GRIFFITH  
CRAIG A. BECK  
DAVID L. MCCUSKEY  
THOMAS O. MOE  
JAMES H. OHAGAN  
JOHN M. MARON  
LOREN R. KNOTT  
PHILLIP H. MARTIN  
REESE C. JOHNSON  
CHARLES J. HAUENSTEIN  
CHARLES A. GEER

JOHN C. ZWAKMAN  
JOHN R. WICKS  
EUGENE L. JOHNSON  
JOHN W. WINDHORST, JR.  
MICHAEL PRICHARD  
JOHN P. VITTO  
WILLIAM R. SOTH  
RICHARD G. SWANSON  
FAITH L. OHMAN  
DAVID A. RANHEIM  
ROBERT J. SILVERMAN  
THOMAS R. MANTHEY  
WILLIAM R. HIBBS  
PHILIP F. BOELTER  
WILLIAM B. PRYNE  
ROBERT A. HEIBERG  
JOHN D. KIRBY  
ROBERT A. SCHWARTZBAUER  
DAVID N. FROHEK  
THOMAS W. TINKHAM  
JOHN F. TUTTLE  
EMERY W. BARTLE  
WILLIAM A. JOHNSTONE  
STEVEN K. CHAMPLIN  
MICHAEL J. RADMER  
MICHAEL TRUCANO  
JAMES A. FLADER  
DAVID L. BOEHREN  
MICHAEL A. LAFOND  
DON D. CARLSON  
PAUL J. SCHEERER  
WILLIAM J. KEEPEL  
FRANK H. VOIGT  
WILLIAM H. HIPPEE, JR.  
ROBERT A. BURNS  
ROGER J. MAGNUSON  
PETER S. HENDRIXSON  
JAY F. COOK  
STANLEY M. REIN  
CHARLES L. POTUZNIK  
VERLANE L. ENDORF

880 W-FIRST NATIONAL BANK BUILDING  
ST. PAUL, MINNESOTA 55101  
(612) 227-8017

P.O. BOX 848  
340 FIRST NATIONAL BANK BUILDING  
ROCHESTER, MINNESOTA 55903  
(507) 288-3156

201 DAVIDSON BUILDING  
8 THIRD STREET NORTH  
GREAT FALLS, MONTANA 59401  
(406) 727-3632

1150 RING BUILDING  
1200 18TH STREET N.W.  
WASHINGTON, D.C. 20036  
(202) 296-2780  
(800) 424-2942

312 FIRST NATIONAL BANK BUILDING  
WAYZATA, MINNESOTA 55391  
(612) 475-0373

30 RUE LA BOETIE  
75008 PARIS, FRANCE  
TEL: (1) 582 32 50

DENNIS P. BURATTI  
ROBERT L. HOBBS  
BARRY D. GLAZER  
IRVING WEISER  
STEPHEN E. GOTTSCHALK  
KENNETH L. CUTLER  
OWEN C. MARK  
GARY M. JOHNSON  
ROBERT G. BAYER  
STUART R. HEMPHILL  
J. JACKSON  
W. CHARLES LANTZ  
J. MARQUIS EASTWOOD  
EDWARD J. PLUMER  
J. ROBERT HIBBS  
BRUCE W. BURTON  
SUZANNE B. VAN DYK  
STEVEN F. WOLGAMOT  
JAMES E. BOWLUS  
THOMAS D. VANDER MOLEN  
MARK A. JARBCE  
PAUL B. KLAAS  
MARGERY K. OTTO  
RONALD J. BROWN  
CATHERINE A. BARTLETT  
DAVID J. LUBBEN  
BRUCE J. SHNIDER  
GEORGE G. ECK  
BARBARA S. FARRELL  
MARIANNE D. SHORT  
MICHAEL E. REESLUND  
ELIZABETH A. GOODMAN  
MARIANNE E. DURKIN  
ROBERT J. DWYER, JR.  
BRIAN E. PALMER  
JEROME P. GILLIGAN  
DIANE D. MALFELD  
WILLIAM J. BEPENS  
JAMES D. ALT  
JOEL W. LAWINTMAN  
JEFFREY W. SOGARD\*

MARILYN J. JUSTMAN  
TIMOTHY J. CARLIN  
BARBARA J. MCADOO  
JOSEPH R. LIESCH  
JOHN H. LINDSTROM  
CRAIG D. DIVINEY  
THOMAS E. POPOVICH  
SUSAN J. THOMPSON  
PHILIP M. CHEN  
JOHN T. KRAMER  
PAUL M. TORGERSOHN  
JOYCE M. CONNELLY  
TIMOTHY J. WALSH  
JOSEPH C. GONNELLA  
MARK E. HAMEL  
STEPHEN F. KELLEY  
PAMELA A. FERGEN  
CHERYLL GRASMOEN  
JAY L. SWANSON  
GARY L. BRISBIN  
RANDALL B. OHM  
JAMES R. DORAN  
REGINA C. WILLIAMS-ROTOR  
JAMES B. LYNCH  
KEVIN W. ROUSE  
DANIEL P. O'KEEFE  
CHARLES L. SWEERIS  
MICHAEL J. WAHOSKE  
LOUI-JEAN GILLE  
DONALD M. AMUNDSON  
ROY A. GINSBURG

OF COUNSEL  
WALDO F. MARQUART  
JOHN F. FINN  
LEWIS L. ANDERSON  
RUDOLPH E. LOW  
\*ADMITTED IN MONTANA

January 7, 1982

Stephen Shakman, Esq.  
Minnesota Pollution Control Agency  
1935 W. County Road B2  
Roseville, Minnesota 55113

Re: United States v. Reilly Tar  
& Chemical Corporation  
File No. 4-80-469

Dear Steve:

I have your letter of December 29, 1981, indicating, among other things, that the PCA intends to go forward with the Hickok contract for the work described in the EPA-MPCA agreement for work on Well 23 and other well investigation and well survey work. You indicate that in order to provide Reilly Tar an opportunity to submit a proposal, the PCA will postpone further action on the proposed contract until Monday, January 11, 1982. We appreciate your giving us an opportunity to comment upon and submit an alternative suggestion with respect to Well 23.

This letter is written in accordance with the understanding which we have had for some time that the parties to this litigation would be free to discuss compromises and remedial measures even though the litigation is proceeding, without prejudice to our respective positions. Moreover, I want to emphasize once again that the data we have seen to date does not demonstrate the existence of a public health problem.

I am enclosing a copy of a proposal dated January 4, 1982, received yesterday from Soils Exploration Company and Layne Minnesota, a well drilling firm, for cleaning out Well 23. We suggest that it is a superior proposal to that described in the work statement to the EPA-MPCA contract because it does not involve the two-step process of coring first and cleaning out second.

Stephen Shakman, Esq.  
Page Two

January 7, 1982

In substance, it proposes that the well be cleaned to the original depth with cable tool methods and analyzing at 50 foot intervals. The cost is estimated at \$30,000 to \$34,000 and could well be less than that because the work would be done on an hourly basis. It might be cheaper if no serious obstructions were encountered. We acknowledge that the amount of the Soils Exploration proposal is not radically different from the Hickok proposal. For reasons which will hereinafter be discussed, we have decided to submit this proposal to the State with our recommendation that Soils Exploration's methodology be utilized, but Reilly is not prepared at this time to finance the venture.

Whichever method that the State ultimately chooses for the evaluation of the question of contamination of Well 23, however, Reilly requests an opportunity to have a representative of Soils Exploration Company or Twin City Testing and Engineering Laboratories, Inc. be present at appropriate times so that we may obtain soil and water samples for our own independent chemical analysis. I trust you will have no objection to this; however, I would appreciate it if you would let me know so that Richard Stehly, the Chief Engineer at Soils Exploration Company who is working on this project, may be put in contact with the appropriate contractor in order to obtain such samples.

We also want to state our position that some aspects of the work statement seem to us to be unnecessary and inappropriate. For example, item 2 on page 5 of the work statement proposes the drilling of a new well 500 feet deep adjacent to Well 23, analyze water and core samples, etc., at a cost of \$74,400. We wish to remind the State that the whole theory that there are creosote deposits at the bottom of Well 23 is based upon a good bit of rumor. The Barr Report states that Barr had heard a rumor from a local well driller that creosote had been spilled into this well in the twenties. This was contradicted by a long-time employee, Frank Williams. The USGS Report picked up that rumor and we now seem to be proposing to spend a substantial amount of the taxpayers' money to prove or disprove that rumor. While we have previously suggested that an exploration of Well 23 might be appropriate, it seems to us that the proposed new well should not be drilled unless it is found that there is indeed a large deposit of creosote at the bottom of Well 23. Even then, the results of the Well 23 exploration may reveal that there is a better methodology for determining whether there is contamination in the general area of that well other than the method proposed. Depending upon the results of the Well 23 investigation, we would appreciate an additional opportunity to comment upon that proposed step.

Stephen Shakman, Esq.  
Page Three

January 7, 1982

Item B on page 5 of the work statement proposes the cleaning out of the old sugar beet well at a total cost of \$41,900. This activity is predicated solely upon a December 13, 1934 letter from McCarthy Well Company, which was written in connection with McCarthy's efforts to improve the water quality in a St. Louis Park city well. It states:

"This well always had a creosote taste to the water and we found two old abandoned wells at the Republic Creosoting Co. plant about one half mile away which were being used to drain creosote down to the ground, and it was thought that this creosote was going down in these old wells and passing over thru the crevices in the Shakopee Dolomite and being pumped up into this well, although when the first test was made on this well after pumping 24 hours steady there was no taste of creosote, but when the well had been in operation for about two weeks the creosote taste was noticeable.

There were lots of theories passed by the village and the engineer as to where this was coming from."

I recently sent to you copies of correspondence which indicated that the sugar beet well was plugged in 1934 because of the allegation by the city, never proved, that creosote was finding its way from the Republic Creosote site to the city well. The Department of Health and Reilly had numerous meetings for several years in the 1930's in order to resolve this problem. In any event, since the sugar beet well was plugged in 1934, it seems to us highly unlikely that it could have been a significant pathway for the transport of creosote, especially if Well 23, which pierced several layers of bedrock, uncased, and remains open to this date, shows no significant creosote deposits. Accordingly, if the investigation of Well 23 shows no significant creosote deposits at the bottom of the well, it would seem to be wasteful to proceed with an expensive investigation of the sugar beet well based as it is on the speculation contained in the McCarthy letter.

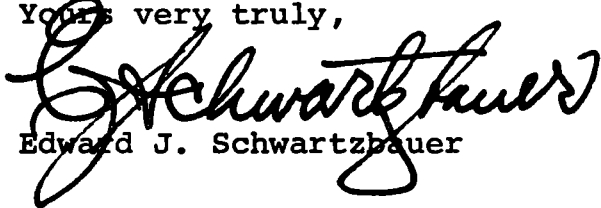
I want to repeat that Reilly is grateful for the opportunity to comment upon the remedial measures being planned for the site. It is because of the speculative nature of the work proposed as discussed above, that Reilly declines at this time to make a financial contribution to those efforts, except as above described.

Stephen Shakman, Esq.  
Page Four

January 7, 1982

We assure you that we shall continue to review the State's proposals in a constructive manner and will offer to share in the effort if we feel that it will lead to a productive result.

Yours very truly,



Edward J. Schwartzbauer

EJS:ml  
Enclosure

cc: Francis X. Hermann, Esq.  
Allen Hinderaker, Esq.  
Joseph C. Vesely, Esq.  
Robert Polack, Esq.  
Richard D. Stehly, P.E.  
Thomas E. Reiersgord, Esq.  
John C. Craun, P.E.